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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PEOPLE OF THE STATE OF ILLINOIS,
Respondent,

v.

JAMES D. COLE, SR. and JAMES D. COLE, JR.,
Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF ILLINOIS

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QUESTIONS PRESENTED FOR REVIEW

Whether the Supreme Court of the State of Illinois correctly held that the trial and conviction of the Defendants, James D. Cole, Sr. and James D. Cole, Jr., for the offense of Solicitation To Commit Murder did not violate the constitutional bar against double jeopardy.

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PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF ILLINOIS

The Defendants, James D. Cole, Sr. and James D. Cole, Jr., petition for a Writ of Certiorari to review the judgment of the Supreme Court of the State of Illinois in this case.

OPINION BELOW

The opinion of the Supreme Court of the State of Illinois is reported at 61 Ill. Dec. 793, 435 N.E. 2d. 490, and is attached to this Petition in the Appendix A. The Order of the Supreme Court of the State of Illinois denying the Defendants' Petition for Re-Hearing, entered May 27, 1982, is attached secondly in Appendix B of this Petition. The Opinion of the Appellate Court of Illinois, Third District, reversed by the Supreme Court, is reported at 98 Ill. App. 3d 309, 53 Ill. Dec. 758, 424 N.E.2d 393, and is attached in Appendix C.

JURISDICTION

The judgment of the Supreme Court of the State of Illinois, was entered on April 16, 1982. Defendants' Petition for Re-Hearing was denied May 27, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3) by virtue of Defendants' claim that they were denied the right guaranteed by the Constitution of the protection against double jeopardy.

CONSTITUTIONAL PROVISION

AMENDMENT V — CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. *U.S.C. Const. Amend. V*

STATEMENT OF FACTS

On January 15, 1980, Defendants were indicted; in Count I, with soliciting the murder of Robert H. Jones by requesting William Haley to commit that offense; in Count II, with soliciting the murder of Robert H. Jones by encouraging William Haley to commit that offense; and in Count III, with

conspiring to murder Robert H. Jones by agreeing with each other and William Haley to commit that offense (C-3).[1]

The direct testimony of Illinois Division of Criminal Investigation agent William Haley, in each trial, indicated that both trials concern the same transaction. Insofar as relevant for this limited purpose that testimony is that Haley contracted on Friday, January 11, 1980, and in an undercover capacity to murder Robert H. Jones on behalf of Defendants (R1-85, R2-146). On Tuesday, he had met with the informant Al Martin who set up a meeting with Defendant, Cole, Jr., at his place of business (R1-7, R2-96). Haley met with Cole, Jr. the following noon (R1-9, R2-99) and again, for lunch on Friday (R1-11, R2-103). That evening, Haley met with both Defendants in a parking lot (R1-52, R2-114). He was driven to a residential suburb and the home of the intended victim was shown to him (R1-66, R2-132). Upon returning to the parking lot, the price of $1500.00 was agreed upon (R1-71, R2-137). A deposit of $200.00 was paid to Haley (R1-66, R2-132). Defendants were arrested later that night.

Upon trial by jury on April 7, 1980, Defendants were acquitted of Counts I and III. The Court entered a mistrial as to Count II upon which the jury was unable to agree (C-93). Defendants thereupon moved for discharge from any further prosecution under Count II upon the grounds that a retrial would place Defendants in double jeopardy. This motion was denied on April 22, 1980 (C-95). On June 9, 1980, Defendants again moved for dismissal of Count II which motion was denied on that day and the trial began (C-124). At this trial the jury convicted (C-202).

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[1] "C" refers to the common law record.

R1 Refers to the transcript of testimony taken in the first trial of the Defendants;

R2 Refers to the transcript of the second trial.

On July 10, 1980, Defendants moved to arrest the judgment (C-203). This motion was denied on July 18, 1980, and each Defendant sentenced to five (5) years imprisonment (C-213).

REASONS FOR GRANTING THE PETITION

The opinion of the Supreme Court of the State of Illinois is in direct conflict with the double jeopardy provision contained in the Fifth Amendment to the Constitution of the United States. The sole issue raised throughout review of the Defendants' convictions has been that the second trial and conviction of the Defendants denied them the constitutional right and protection of the double jeopardy provision.

The Defendants were each charged in a three count indictment with two Illinois Statutory offenses. One of the three counts charged the offense of conspiracy to commit murder. Defendants were acquitted of that offense at their first trial and no issue remains as to that offense. The remaining two counts were brought out of the single statutory offense of solicitation (to commit the offense of murder). The Illinois Statute defining the offense of solicitation reads as follows:

> "A person commits solicitation when, with intent that an offense be committed, he commands, encourages or requests another to commit that offense." (Ill. Rev. Stats., Ch. 38, Sec. 8-1(a))

As indicated in the Statement of Facts, all of the charges related to a single transaction. Defendants were charged with conspiring to commit the murder of, and soliciting the murder of, a single person, one Robert H. Jones.

Both trials of the Defendants were based upon the same set of facts. The State chose to charge Defendants with the offense of solicitation in two counts, by charging in one count that they "requested" the commission of murder and charging in the other count that they "encouraged" the commission of murder.

It is clear from the facts and a reading of the Solicitation Statute that the Defendants were charged with a single offense,

albeit in two counts. As indicated in the opinion of the Illinois Supreme Court in this case, the "State conceded that there is only one crime of solicitation." *People* v. *Cole,* 61 Ill. Dec. 793, at 794, 435 N.E.2d 490 (Illinois Supreme Court) (Page 2 of the Court's Opinion attached in the Appendix A). It is clear from the opinion of the Court that the Court agreed that there is but one single offense of solicitation.

However, the Illinois Supreme Court proceeded to turn the issue upside down. The Court referred to a general principle that a mistrial carries different double jeopardy ramifications than an acquittal; that a mistrial, declared because the jury was unable to reach a decision, does not bar a new trial. In support of this reasoning the Illinois Supreme Court relied upon an opinion of the United States Supreme Court issued in *Lee* v. *United States,* 432 U.S. 23, 97 S. Ct. 2141, 53 L. Ed. 2d 80 (1977). The key part of the portion cited by the Court, and apparently relied upon, reads as follows: "A mistrial ruling invariably rests on grounds consistent with reprosecution..." *Lee* v. *United States,* 432 U.S. at 30, 97 S. Ct. at 2145, 53 L. Ed. 2d at 87.

The Illinois Supreme Court's reliance on *Lee* is incorrect. *Lee* did not involve a case where a single offense was fragmented into two separate counts and where the Defendant stood acquitted on one of the fragmented counts. By relying on *Lee,* the Supreme Court of Illinois allowed what amounts to an exception to the rule against double jeopardy to swallow the rule.

Rather than looking at the issue with the stress on the mistrial, the issue should be examined in light of the plain meaning of the words of the double jeopardy provision of the Fifth Amendment to the United States Constitution. "... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb..." U.S.C. Const. Amend. V. At the end of their first trial Defendants had a jury verdict acquitting

them of the offense of solicitation. Their subsequent re-trial for the same offense of solicitation caused them to "be twice put in jeopardy" and their subsequent conviction was therefore obtained in violation of the Constitutional proscription.

This becomes even clearer when examined on the basis of the Illinois Statutory embodiment of the double jeopardy provision.

> "A prosecution is barred if the Defendant was formerly prosecuted for the same offense, based upon the same facts, if such former prosecution:
>
> (1) Resulted in either a conviction or an acquittal or in a determination that the evidence was insufficient to warrant a conviction. Ill. Rev. Stats., 1979, Ch. 38, Sec. 3-4(a)

The Defendants were prosecuted for the same offense in both trials. Both prosecutions were based upon the same facts. There was a verdict of acquittal rendered by the jury as to the offense of solicitation in the first trial. The case at bar meets the test expressed in the above statutory language.

The State was not required to fragment the solicitation charge into two counts. The Solicitation Statute uses the words to describe the means of committing the offense in the disjunctive. The State could have cited the offense in the disjunctive in a single count. However, the State did fragment the offense. Because the Illinois Supreme Court misapplied the double jeopardy provision, the Defendants stand both acquitted and convicted of the same single offense.

CONCLUSION

The opinion of the Illinois Supreme Court misinterprets and misapplies the double jeopardy provision of the United States Constitution. The Defendants were thus denied their right to the constitutional protection afforded them by that provision. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Docket No. 55371—Agenda 13—January 1982.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellant,

v.

JAMES D. COLE, Sr., *et al.*, Appellees.

JUSTICE MORAN delivered the opinion of the court:

On January 15, 1980, a three-count indictment was returned against defendants, James D. Cole, Sr., and Jame D. Cole, Jr. Count I of the indictment charged defendants with solicitation (to commit murder) in that they *requested* William Haley, a special agent for the Department of Law Enforcement, to murder Robert H. Jones. Count II of the indictment charged defendants with solicitation (to commit murder) in that they *encouraged* Haley to murder Jones. Count III charged defendants with conspiracy (to commit murder). Following a jury trial in the circuit court of Peoria County, the defendants were acquitted on counts I and III. The jury was unable to reach a verdict on count II, which charged defendants with solicitation by encouragement. A mistrial was therefore declared as to count II. After denying defendants' motion to dismiss that count, the trial court ordered a second trial. Following a second jury trial, defendants were convicted, and each was sentenced to a five-year prison term. The appellate court reversed the judgments of conviction, holding that defendants' second solicitation trial violated the double-jeopardy provisions of our Federal and State constitutions. 98 Ill. App. 3d 309.

This review presents one issue: Did defendants' second trial for solicitation (to commit murder) by encouraging Haley to murder Jones violate the double jeopardy provisions of the United States and Illinois constitutions.

Both the fifth amendment to the United States Constitution and article I, section 10, of the Illinois Constitution protect persons from being placed twice in jeopardy for the same offense. In addition, section 3—4(a) of the Criminal Code of 1961 (Code) (Ill. Rev. State. 1979, ch. 38, par. 3—4(a)) provides:

> "A prosecution is barred if the defendant was formerly prosecuted for the same offense, based upon the same facts, if such former prosecution:
>
> (1) Resulted in either a conviction or an acquittal or in a determination that the evidence was insufficient to warrant a conviction."

Section 8—1 of the Code (Ill. Rev. Stat. 1979, ch. 38, par. 8—1(a)) provides:

> "Solicitation.
>
> (a) Elements of the offense.
>
> A person commits solicitation when, with intent that an offense be committed, he commands, encourages or requests another to commit that offense."

The State concedes that there is only one crime of solicitation. It argues, however, that acquittal of solicitation by *requesting* another to commit an offense (count I) does not bar reprosecution for solicitation by *encouraging* another to commit an offense (count II) when the jury, in the first trial, was unable to reach a verdict on the latter count. Defendants argue that their acquittal on count I constituted an acquittal of the entire solicitation offense, thereby barring their reprosecution under any theory of solicitation.

We first note the well-established principle that a mistrial carries different double-jeopardy ramifications than an acquittal or, for that matter, in some instances, a dismissal. As the United

States Supreme Court stated in *Lee* v. *United States* (1977), 432 U.S. 23, 29-30, 53 L. Ed. 2d 80, 87, 97 S. Ct. 2141, 2145:

> "[W]e recognize [in *United States* v. *Jenkins* (1975), 420 U.S. 358, 365 n.7, 43 L. Ed. 2d 250, 256 n.7, 95 S. Ct. 1006, 1011 n.7] that it was 'of critical importance' that the proceedings in the trial court had terminated 'in the defendant's favor' rather than in a mistrial.***
>
> *** The critical question is whether the order contemplates an end to all prosecution of the defendant for the offense charged. A mistrial ruling invariably rests on grounds consistent with reprosecution, see *United States* v. *Jorn*, 400 U.S. 470, 476, 27 L. Ed. 2d 543, 91 S. Ct. 547 (1971) (plurality opinion), while a dismissal may or may not do so."

It is also well established that a court may properly declare a mistrial and discharge a jury when it is apparent the jury is hopelessly deadlocked *(People* v. *Bean* (1976), 64 Ill. 2d 123, 127-28 citing *People* v. *Mays* (1962), 23 Ill. 2d 520, 524) and that, in the absence of an abuse of discretion by the trial court when it discharges a jury because of its failure to reach a verdict, the constitutional prohibition against double jeopardy does not bar a new trial. *(People* v. *Bean* (1976), 64 Ill. 2d 123, 128; *People* v. *Nilsson* (1970), 44 Ill. 2d 244, 246. See *United States* v. *Jorn* (1971), 400 U.S. 470, 27 L. Ed. 2d 543, 91 S. Ct. 547; *United States* v. *Perez* (1824), 22 U.S. (9 Wheat.) 579, 6 L. Ed. 165.) Here, there is no claim that the trial court abused its discretion by discharging the jury and declaring a mistrial on count II. Thus, a reprosecution on that count would not normally be barred by the constitution prohibition against double jeopardy. The question then becomes whether defendants' acquittal on count I based on another theory of the same offense, transcends the general rule allowing reprosecution under the same indictment after a mistrial has been declared.

In support of their argument that reprosecution on count II is barred, defendants cite *People* v. *Allen* (1974), 56 Ill. 2d 536, *cert. denied* (1974), 419 U.S. 865, 52 L. Ed. 102, 95 S. Ct. 120, the case upon which the appellate court principally relied in reaching its decision. In *Allen,* the defendant was charged by indictment with two counts of murder under sections 9—1(a)(1) and (a)(2) of the Code (Ill Rev. Stat. 1967, ch. 38, pars. 9—1(a)(1), (a)(2)). The trial court instructed the jury under sections 9—1(a)(1) and (a)(2), as well as under section 9—1(a)(3) for felony murder, a theory under which defendant had not been charged. The defendant was convicted of murder. He appealed, contending that felony murder was a distinct crime from murder as defined in sections 9—1(a)(1) and (a)(2) of the Code and that it was a denial of due process for the court to instruct the jury on an offense with which he had not been charged. The court rejected this argument and found that defendant was aware of the State's felony-murder theory and was not misled in preparing a defense. This court also stated:

> "Under section 9—1 there is but one crime of murder, not three separate and distinct offenses as the defendant's argument assumes. Each of subparagraphs (1), (2) and (3) under section 9—1(a) describes the mental state or the conduct of the defendant which must accompany the acts which cause the death. *If the defenant were charged with murder under subparagraph (a)(1) and acquitted, he could not again be charged and tried for murder of the same individual under subparagraph (a)(2) or (a)(3).* Thus, there is no possibility that the defendant in this case could have been twice put in jeopardy. Also, the provision of our statute covering the effect of a former prosecution (Ill. Rev. Stat. 1967, ch. 38, par. 3—4) prohibits a subsequent prosecution of the defendant under such circumstances." (Emphasis added.) (56 Ill. 2d 536, 543.)

See also *United States ex rel. Harris* v. *Illinois* (7th Cir. 1972), 457 F.2d 191, 197, *cert. denied* (1972), 409 U.S. 860, 34 L. Ed. 2d 106, 93 S. Ct. 147; *People* v. *Johnson* (1976), 65 Ill. 2d 332, 337-39; *People* v. *Rosochacki* (1969), 41 Ill. 2d 483, 491-92.

We find *Allen* inapplicable. In that case, there was a single prosecution in which defendant was found guilty under a theory not alleged in the indictment. The court referred to double jeopardy in finding the variance between the charge alleged and the proof adduced at trial to be nonfatal.

We agree that the State cannot charge a defendant under one theory and, following an acquittal under that theory, subsequently recharge and prosecute under another theory for the same offense. However, that is not what occurred in the instant case. In contrast to the hypothetical alluded to by the above-quoted language in *Allen*, this case does not involve a reprosecution based upon a theory of the same offense that was not previously charged. Request and encouragement are two disjunctive methods by which the offense of solicitation can be committed and reflect the legislature's intent to include varying degrees of involvement on the part of the solicitor. Here, the State charged defendants with solicitation under two theories, each brought under a separate count. The jury acquitted defendants of only solicitation by request. Its inability to reach a verdict as to solicitation by encouragement is not tantamount to an acquittal under such theory.

To allow the acquittal under count I to bar retrial under count II would, in effect, create an anomaly. On one hand, reprosecution would be precluded when two theories of an offense are split into two counts, with one count resulting in acquittal and the other in mistrial because of the jury's inability to reach a verdict. Yet, if, in the instant case, solicitation by encouragement and solicitation by request were charged in the same

count, and had the jury been unable to reach a decision under the encouragement theory, it is reasonable to assume that the jury would have been unable to return a verdict on the entire count. In that event, the declaration of a mistrial would have resulted in a reprosecution without any double jeopardy violations. Under the circumstances of this case, we hold the reprosecution of defendants for solicitation (to commit murder) by encouraging agent Haley to murder Robert Jones was not barred by the constitutional or statutory prohibitions against double jeopardy.

Accordingly, the judgment of the appellate court is reversed and the judgments of the circuit court of Peoria County following defendants' second trial are affirmed.

Appellate court reversed;
circuit court affirmed.

APPENDIX B

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H. Wayne Rusell
Clerk

May 27, 1982

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No. 55371 — People State of Illinois, appellant, v. James D. Cole, Sr., et al., appellees. Appeal, Appellate Court, Third District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

Very truly yours,

/s/ H. Wayne Russell
Clerk of the Supreme Court

APPENDIX C

**PEOPLE of the State of Illinois,
Plaintiff-Appellee,**

v.

**James D. COLE, Sr. and James D. Cole,
Jr., Defendants-Appellants.**

No. 80-379.

Appellate Court of Illinois,
Third District.

July 23, 1981.

Defendants were convicted before the Circuit Court, Tenth Judicial Circuit, Peoria County, Calvin R. Stone, J., of solicitation by encouragement to commit murder, following mistrial on such charge in first trial of defendants, which also resulted in acquittal on charges of solicitation by request to commit murder and of conspiracy to commit murder. Both defendants appealed. The Appellate Court, Barry, J., held that solicitation statute encompasses one, and only one, offense, which can be committed in any one of three ways; accordingly, when defendants were acquitted of crime of solicitation under a request theory, double jeopardy provisions of the Federal and State Constitutions prohibited their retrial for same crime under an encouragement theory.

Reversed.

1. Criminal Law (key) 45

Statute pertaining to crime of solicitation encompasses one, and only one offense, which can be committed in any one of three ways: by commanding, requesting, or encouraging another to commit an offense. S.H.A. ch. 38, § 8-1(a).

2. Criminal Law (key) 45

The words "commands, requests or encourages" in solicitation statute merely state within one statutory section the three alternative ways in which the crime of solicitation can be committed, and reflect the legislature's intention to include varying degrees of involvement on part of solicitor within one encompassing inchoate offense. S.H.A. ch. 38, § 8-1(a).

3. Criminal Law (key) 206(1)

It is within discretion of state's attorneys to charge a defendant with three separate methods of solicitation under each of the three theories of prosecution set out in solicitation statute, a conviction or acquittal under any one theory bars further prosecution under any of the others when all counts are based upon same set of facts. U.S.C.A.Const. Amend. 5; S.H.A.Const. Art. 1, § 10; S.H.A. ch. 38, § 8-1(a).

4. Criminal Law (key) 200(1)

Where defendants were acquitted of crime of solicitation under a request theory, double jeopardy provisions of Federal and State Constitutions prohibited their retrial for same crime under an encouragement theory. U.S.C.A.Const. Amend. 5; S.H.A.Const. Art. 1, § 10; S.H.A. ch. 38, § 8-1(a).

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Terry A. Mertel, John X. Breslin, State's Attys., Appellate Service Commission, Ottawa, John A. Barra, State's Atty., Peoria, for plaintiff-appellee.

BARRY, Justice.

On January 15, 1980, the grand jury of Peoria County returned a three count indictment against defendants James D. Cole, Sr., and James D. Cole, Jr. Count I of the indictment charged the defendants with the crime of solicitation (to commit murder) in that they requested William Haley, a special agent for the Illinois Department of Law Enforcement, to murder attorney Robert H. Jones (Ill.Rev.Stat.1979, ch. 38, par. 8-1(a)). Count II of the indictment charged the defendants with the crime of solicitation (to commit murder) in that they encouraged agent Haley to murder Jones (Ill.Rev.Stat.1979, ch. 38, par. 8-1(a)). Count III charged the defendants with conspiracy (to commit murder) (Ill.Rev.Stat.1979, ch. 38, par. 8-2(a)). Following a jury trial in the circuit court of Peoria County, the defendants were acquitted on counts I and III, *i. e.*, the solicitation by request charge and the conspiracy charge. The jury was, however, unable to reach a verdict on the remaining solicitation count, count II, which charged the defendants with solicitation by encouragement. A mistrial was declared as to count II and, after denying defendants' motion to dismiss that count, the trial court ordered a second trial on count II. Following the second jury trial, both defendants were convicted. Each was subsequently sentenced to the Department of Corrections for a term of five (5) years. Bond was denied, and defendants have since been incarcerated.

On appeal the defendants raise only one issue for our consideration: Did their second trial on count II of the indictment violate the double jeopardy provisions of both the United States and Illinois Constitutions (U.S.Const. amend V; Ill.Const. of 1970, Art. I, sec. 10). "A prosecution is barred if the defendant was formerly prosecuted for the same offense, based upon the same facts, if such former prosecution * * [r]esulted in either a conviction or an acquittal * * *." (Ill.Rev.Stat.1979, ch. 38, par. 3-4(a)(1).) The defendants contend that the Illinois solicita-

tion statute, which provides that "[a] person commits solicitation when, with intent that an offense be committed, he commands, encourages or requests another to commit that offense" (Ill.Rev.Stat.1979, ch. 38, par. 8-1(a)), defines but one offense which can be committed in any one of three ways. Consequently, they argue, when they were acquitted of the crime of solicitation by request (count I), they could not be retried for the same act of solicitation under a different charge (solicitation by encouragement), because in so doing they would be placed twice in jeopardy for the same offense.

[1-3] The defendants' position is not without merit, and is supported by the decision of our Supreme Court in *People* v. *Allen* (1974), 56 Ill.2d 536, 309 N.E.2d 544, *cert. denied* 419 U.S. 865, 95 S.Ct. 120, 42 L.Ed.2d 102. In *Allen*, the defendant was charged by indictment with two counts of murder (Ill.Rev.Stat.1967, ch. 38, pars. 9-1(a)(1), (2)). Although he was not charged with felony murder (Ill.Rev.Stat.1967, ch. 38, par. 9-1(a)(3)), the trial court instructed the jury on this theory. On appeal from his conviction, the defendant contended that because felony murder is a distinct crime the trial court violated his due process rights by instructing the jury on an offense for which he had not been charged. The Supreme Court, in rejecting this argument, made the following statements which are highly pertinent to the instant case:

> "Under section 9-1 there is but one crime of murder, not three separate and distinct offenses as the defendant's argument assumes. Each of subparagraphs (1), (2) and (3) under section 9-1(a) describes the mental state or the conduct of the defendnt which must accompany the acts which cause the death. If the defendant were charged with murder under subparagraph (a)(1) and acquitted, he could not again be charged and tried for murder of the same individual under subparagraph (a)(2) or (a)(3). Thus, there is

> no possibility that the defendant in this case could have been twice put in jeopardy. Also, the provision of our statute covering the effect of a former prosecution (Ill.Rev.Stat.1967, ch. 38, par. 3-4) prohibits a subsequent prosecution of the defendant under such circumstances." 56 Ill.2d at 543, 309 N.E.2d at 547-48.

(*Accord, People* v. *Wilson* (1978) 61 Ill.App.3d 1029, 18 Ill.Dec. 914, 378 N.E.2d 378.) Certainly, if subsections (a)(1), (a)(2), and (a)(3) of the Illinois murder statute do not define separate and distinct offenses, the words "commands, requests or encourages" do not constitute separate and distinct crimes of solicitation. By analogy, *Allen* clearly dictates that there is but one offense of solicitation under section 8-1(a) of the Criminal Code (*See* Ill.Ann.Stat. ch. 38, par. 8-1, Committee Comments—1961, at 454-55 (Smith-Hurd 1972)). The words "commands, requests or encourages" merely state within one statutory section the three alternative ways in which the crime of solicitation can be committed, and reflect the legislature's intention to include varying degrees of involvement on the part of the solicitor within one encompassing inchoate offense (*See* Ill.Rev. Stat.1979, ch. 38, par. 2-20). Although we agree with the State that it is within the discretion of State's attorneys to charge a defendant with three separate methods of solicitation under each of the three theories of prosecution (*See, e. g., People* v. *Corbetto* (1975), 32 Ill.App.3d 696, 336 N.E.2d 505), once the prosecution has made its choice, a conviction or acquittal under any one theory bars further prosecution under any of the others when all counts are based upon the same set of facts. Such is the situation in the case at bar.

In holding that section 8-1(a) of the Criminal Code states only one offense, we necessarily reject the State's contention that each "theory" under which the crime of solicitation can be perpetrated constitutes a separate offense. The State argues that

because solicitation by request requires different proof than solicitation by encouragment (in that with the former the State would be required to prove that the idea of murdering Jones originated with the defendants, while with the latter, the State would be required to prove the idea originated with Haley, the "hit man"), solicitation by request and solicitation by encouragement are two distinct and separable offenses.[1] We find this argument to be unconvincing for several reasons. First, a similar analysis could be made of the Illinois murder statute in support of a contention that subsections (a)(1), (a)(2), and (a)(3) of that statute constitute separate offenses (Ill.Rev.Stat.1979, ch. 38, pars. 9-1(a)(1), (2), (3)). In light of *Allen* such an analysis must fail. Second, if the State were required to prove that the idea of murdering Jones originated with special agent Haley in order to prove that the defendant committed the crime of solicitation by encouragement, it would simultaneously be proving the defense of entrapment. It is well settled that for an entrapment to exist "the idea of committing the offense must originate not with the suspect but with the enforcement authorities." (*People* v. *Fisher* 1979), 74 Ill.App.3d 330, 334, 30 Ill.Dec. 210, 214, 392 N.E.2d 974, 978.) The State's effort to require different proofs for each of the theories under which the crime of solicitation can be committed leads to an incongruous situation, *i. e.*, the proof of a crime being identical with the proof of a defense which negates criminal liability, exposing the inherent weakness of the State's position. Further it would appear that to command or encourage the commission of a crime would necessarily include to "request", the State's proof of which failed by virtue of the jury's acquittal on count I.

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[1] "The test of the identity of offenses is whether each statutory provision requires the proof of an additional fact which the other does not." *People* v. *Goolsby* (1979), 70 Ill.App.3d 832, 837, 26 Ill.Dec. 893, 896, 388 N.E.2d 894, 897, citing *Blockburger* v. *United States* (1932), 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306.

[4] In summation, we believe that section 8-1(a) of the Criminal Code encompasses one, and only one, offense: that of solicitation. By the very terms of the statute, the crime of solicitation can be committed in any one of three ways: by commanding, requesting, or encouraging another to commit an offense. Those three possible descriptions of the same activity do not constitute separate and distinct offenses or crimes when based upon one incident. Rather, by our view, the statute offers the State several methods of charging and prosecuting for the same offense. Accordingly, when the defendants were acquitted of the crime of solicitation under a request theory, the double jeopardy provisions of our federal and state constitutions prohibited their retrial for the same crime under a different theory (encouragement). The defendants' second soliciation trial was clearly in contravention of the defendants' right to be free from double jeopardy, and as a consequence the convictions which followed that second trial must be reversed.

For these reasons, we reverse the judgments of the circuit court of Peoria County.

Judgments reversed.

SCOTT, P. J., and HEIPLE, J., concur.

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No. 82-143

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PEOPLE OF THE STATE OF ILLINOIS,

Respondent,

vs.

JAMES D. COLE, SR. and JAMES D. COLE, JR.,

Petitioners.

On Petition For Writ Of Certiorari
To The Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Supreme Court of the State of Illinois correctly held that the trial and conviction of the Defendants, James D. Cole, Sr. and James D. Cole, Jr., for the offense of Solicitation To Commit Murder did not violate the constitutional bar against double jeopardy.

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RESPONDENT'S BRIEF IN OPPOSITION

REASON FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

THE DECISION BELOW DENYING THE CLAIM OF A DOUBLE JEOPARDY VIOLATION WAS CORRECT AND REFLECTS PREVIOUS DECISIONS OF THIS COURT.

The general purpose of the Double Jeopardy Clause of the Fifth Amendment is "to protect an individual from being subjected to the hazards of trial and possible con-

viction more than once for an alleged offense." *Green v. United States*, 355 U.S. 184, 187 (1957). A variety of claims raising double jeopardy issues have been examined by this Court. (See catalogue: *United States v. DiFrancesco*, 449 U.S. 117, 126-131 (1980).) The dispositive rulings regarding the permissibility of reprosecution after declaration of a mistrial must serve as the basis of adjudication of the instant Petition for Writ of Certiorari.

This Court has long recognized that government may reprosecute absent a final judgment in the initial proceedings. *United States v. Perez*, 9 Wheat 579 (1824); *Wade v. Hunter*, 336 U.S. 684 (1949); *United States v. Jorn*, 400 U.S. 470 (1971); *Illinois v. Somerville*, 410 U.S. 458 (1973); *United States v. Dinitz*, 424 U.S. 600 (1976); *United States v. Martin Linen Supply Company et al.*, 430 U.S. 564 (1977); *Lee v. United States*, 432 U.S. 23 (1977); *Arizona v. Washington*, 434 U.S. 497 (1978).

In the instant case, a mistrial was declared as to Count II of a multicount indictment. Count II of the indictment stated an alternative basis for determination of guilt or innocence to the charge of solicitation (to commit murder) by encouraging a third party to murder the intended victim. *People v. Cole, et al.*, 61 Ill. Dec. 793, 435 N.E.2d 490 (1982). The petitioners were retried on Count II and were convicted. The Illinois Supreme Court relying on the rule that a mistrial ruling invariably rests on grounds consistent with reprosecution, *Lee v. United States*, 432 U.S. 29 (1977) found no violation of the constitutional guarantees against double jeopardy.

A reviewing court is mandated to judge whether there is a "manifest necessity" for the declaration of a mistrial

that results in exposure to reprosecution. *United States v. Perez*, 9 Wheat at 580. For a mistrial is not considered a final judgment in favor of a defendant that would automatically bar reprosecution. *Illinois v. Somerville*, 410 U.S. 458 (1973). However, an inability of a jury to return a verdict has traditionally been accepted as justification for reprosecution. *Logan v. United States*, 144 U.S. 263 (1892); *Dreyer v. Illinois*, 187 U.S. 71 (1902); *Keerl v. Montana*, 213 U.S. 135 (1909); *United States v. Martin Linen Supply Company, et al.*, 430 U.S. at 570; *United States v. Sanford*, 429 U.S. 14 (1976).

The petitioners premise their claim of error by the court below on an unwarranted assumption. They claim that the disparate results of the jury deliberations, acquittal on one count and inability to reach a final determination on the other count, should be viewed as termination in the petitioners' favor. (Petitioners' Brief, pp. 6-7). The law is clear, however, that consistency in verdicts on several counts of an indictment is not required and each count should be viewed as a separate indictment. *Dunn v. United States*, 284 U.S. 390 (1932); *Hamling v. United States*, 418 U.S. 87 (1974). The acquittal on one count of the indictment does not effect the absence of the finality of judgment requirement necessary to bar reprosecution on the other indictment count.

CONCLUSION

It is the contention of the respondent that the decision of the court below, rejecting the claim of a double jeopardy violation because a mistrial disposition does not constitute a final judgment precluding reprosecution, is correct and in conformity with the previous decisions of this Court. For this reason, the respondent respectfully requests this Court to deny the petitioners' request for issuance of a Writ of Certiorari.

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PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Whether the Supreme Court of the State of Illinois correctly held that the trial and conviction of the Defendants, James D. Cole, Sr. and James D. Cole, Jr., for the offense of Solicitation To Commit Murder did not violate the constitutional bar against double jeopardy.

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PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

RESPONDENT'S BRIEF AND ARGUMENT RESTS ON CASES THAT ARE INAPPLICABLE TO THE ISSUE OF WHETHER DOUBLE JEOPARDY ATTACHES WHERE DEFENDANTS STAND ACQUITTED OF THE SAME OFFENSE.

Petitioners have no quarrel with the general principle that a mistrial does not bar subsequent retrial. Petitioners acknowledge that consistency in verdicts on several counts of an indictment is generally not required. Petitioners contend, however, that the argument and authorities posed by Respondent beg the issue.

Dunn v. *United States,* 284 U.S. 390 (1932), cited by Respondent does not apply to the case at bar. The Defendant in *Dunn* was charged with three, *separate* offenses. The jury acquitted Defendant on two of the counts in the indictment, but convicted Defendant on the third count in *one* trial.

Hamling v. *United States*, 418 U.S. 87 (1974), similarly concerned a *single* trial of the Defendants in that case. The Defendants were charged in separate counts with *separate* offenses of obscenity. The jury was unable to reach a verdict as to some of the counts, but convicted Defendants of obscenity based on other, *separate* materials. The holding of the Supreme Court in *Hamling* was that consistency of verdicts is not required, that a mistrial on some counts does not invalidate guilty verdicts rendered in the same trial on other similar, but separate offenses.

The Supreme Court for the State of Illinois has held, and Respondent has even acknowledged, that there is but one, single offense of solicitation as charged in the base at bar. The State chose to instruct the jury in separate verdict forms on two theories of committing the same offense. Defendants stood, and stand acquitted of the offense of solicitation after their first trial. Defendants were subsequently convicted of the same offense in their second trial. The bar against double jeopardy clearly applies and Defendants' conviction should be invalidated.

CONCLUSION

For the reasons stated in the Petition and in this Reply, the Supreme Court of the United States should issue a Writ of Certiorari to prevent the State of Illinois from denying Petitioners the constitutional protection against double jeopardy.

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